APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,130

LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside, and on Cross-petition for Enforcement of, an Order of the National Labor Relations Board

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Decided June 6, 1963

Mr. Donald J. Capuano, with whom *Mr. Patrick C. O'Donoghue* was on the brief, for petitioner. *Mr. Martin F. O'Donoghue* also entered an appearance for petitioner.

Mr. Gary Green, Attorney, National Labor Relations Board, with whom *Messrs. Stuart Rothman*, General Counsel at the time of argument, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before BASTIAN, BURGER and WRIGHT, Circuit Judges.

BASTIAN, *Circuit Judge*: This case is before the court on a petition to review and set aside an order of the National

Labor Relations Board. The Board, in its answer, has requested enforcement of the order.

The facts of the case are as follows: On November 30, 1959, the Arthur Venneri Company [Venneri], a general contractor, was awarded a construction contract by the United States Corps of Engineers to build two airplane hangars at Andrews Air Force Base, Maryland. Venneri then subcontracted the inside plumbing work to Akron Mechanical Contractors, Inc. [Akron] and the outside utilities to Nickles Bros., Inc. [Nickles], an excavating contractor, which had a bargaining agreement with the Hod Carriers, Building and Common Laborers Union of America. After it had been awarded the subcontract, Akron entered into a bargaining agreement with petitioner, Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO [Local 5], to obtain union plumbers for the construction of the hangars. That agreement contained a clause which reads, in pertinent part:

> "*32.* It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or general contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. . . ."

After the bargaining agreement was signed, Local 5 learned that Akron had accepted only inside plumbing work. Forthwith, it claimed jurisdiction over both the inside and the outside plumbing, objecting to Akron's acquiescence in the assignment of some of the plumbing work to Nickles, since installation of any plumbing by Nickles would violate clause 32 of the bargaining agreement. To further its claim, Local 5 refused to refer plumbers to work on the hangar jobs; and it induced Akron's employees to refrain from working on these projects, not to move pipe en route to the hangars, nor to fabricate pipe

destined for these buildings. These actions both the Board and the trial examiner found violated § 8(b)(4)(i) and (ii)(B) of the Labor-Management Relations Act, as amended.[1] We think the Board's determination has ample support in the record.

Respondent's argument rests on a triangular base. To sustain its findings the Board admits there must be substantial evidence in the record that (1) Local 5 induced the employees of Akron and threatened or coerced Akron (2) in order to affect the employment policies of an employer other than Akron (in this case Venneri), (3) one purpose of which was to force Akron to stop doing business with Venneri or, in the alternative, to force Venneri to stop doing business with Nickles. We shall consider these elements in reverse order.

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[1] 61 STAT. 139 (1947), as amended, 29 U.S.C. § 158 (Supp. III, 1959-61):

"*Unfair labor practices.*

* * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

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"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

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(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . ."

First, the evidence is clear that Local 5 wanted one of two resolutions of this dispute: Either it wanted Akron to stop doing business with Venneri, or it wanted Venneri to stop doing business with Nickles. The record indicates that the union would not supply plumbers to Nickles, refusing to have anything to do with that employer. In addition, there is evidence that Local 5 would not do business with any excavating contractor. In view of this attitude, there is no way that the provisions of clause 32 could be followed while both Akron and Nickles remained on the plumbing job.

Since Venneri had entered into contractual relations with both Akron and Nickles by the time this controversy arose, we have no occasion to consider the union's interesting argument that it sought "to force Akron to 'refrain' from doing business with Venneri," an object which it urges is permitted by the wording of the statute. In the present controversy it is clear that the union sought to force Akron to cease doing business with Venneri or, in the alternative, to force Venneri to cease doing business with Nickles.

The record also indicates that the real target of the union's conduct was the subcontracting policy of Venneri. The union warned Venneri in December 1959, apparently before Akron was in the picture, not to split the plumbing work, and reminded the contractor of previous trouble they had experienced on this point. The union also warned Grossman, the president of Akron, before the bargaining agreement was signed, that accepting work from Venneri might mean trouble. Furthermore, the discussion at the meeting on February 15, 1960, between Local 5, Akron and Venneri clearly showed that the union's primary concern was with Venneri's subcontracting policies and not with the policies of Akron.

Buttressed by a persuasive record, the Board further relies on *N.L.R.B.* v. *Enterprise Association, etc.*, 285 F.2d 642 (2d Cir. 1960) and *Local 636, etc.* v. *N.L.R.B.*, 108 U.S.

App.D.C. 24, 278 F.2d 858 (1960). Both of these cases reflect a situation similar to the present one, for in both the union brought pressure on a subcontractor who was powerless to settle the dispute, as is Akron here, in order to affect the purchasing policies of a general contractor. The only significant difference in this case is that the union attempted to influence the subcontracting policies of the general contractor, rather than its purchasing policies. There is nothing in the statute to indicate that this difference should produce a dissimilar result, for in both cases we have a secondary boycott.[2]

The union's principal reliance is on clause 32 of the contract, which we assume, *arguendo* only, is a legal contractual provision. On the basis of this clause, the union makes a two-pronged argument.

First, the union contends this clause demonstrates that its real dispute was with Akron, and not with Venneri, for it shows that the union's object was to change the employment policies of the immediate employer. The union presses on us a fine example of the *non sequitur*. Clause 32 no more demonstrates that the real target of the union's pressure was Akron than a "hot cargo" clause in the contract forbidding Akron to purchase non-union material would show that the union's dispute was with Akron, rather than its suppliers.[3] The subcontracting prohibition in *En-*

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[2] *Retail Clerks Union Local 770* v. *N.L.R.B.*, 111 U.S. App. D.C. 246, 296 F. 2d 368 (1961), cited by petitioner, does not support the union. The court there held that the Board's determination did not conform to the language of the statute. In *Local 770*, the employer had the power to satisfy the union's demands; there was no question of subcontracting and its unique problems.

[3] To be sure, the purpose of a "hot cargo" clause may be different from the purpose of clause 32 (though this need not always be true), but the question before us is: At whom was the union's pressure directed? On this point the clause does not substantiate the union's contention.

terprise and the restriction on off-site fabrication in *Local 636* do not demonstrate that the dispute was with a party to the contract. As we said in *Local 636:*

> "The question is whether the contract provisions in question extend beyond the employer and are aimed really at the union's difference with another employer." 108 U.S.App.D.C. at 30, 278 F.2d at 864.

There is ample evidence in this case to show that the contract provision here in question was really aimed not at Akron, but at the union's difference with Venneri over the later's subcontracting policies.

The second argument of the union is that, if clause 32 is a valid prohibition designed to preserve jobs or job content,[4] then the union can take the measures here employed to enforce it. The Board correctly counters with the argument that *Sand Door*[5] disposes of this suggestion. That case teaches us that regardless of the legitimacy of the end sought by the union, it cannot engage in secondary pressure to obtain it. We find nothing in this case which distinguishes it from that rule. Admittedly, clause 32 is not identical to the "hot cargo" provision in *Sand Door*, but that case is not limited to "hot cargo" clauses. As the Supreme Court said:

> ". . . [I]t seems most probable that the freedom of choice for the employer contemplated by § 8(b)(4)(A)

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[4] The union urges that clause 32 is not a typical work protection clause exempted under the provisions of § 8(e) of the Act. On appeal the Board does not argue this point. We therefore decline to pass upon the question of whether this is a § 8(e) exemption clause and whether such an exempted clause may be enforced by means proscribed by § 8(b)(4)(B). We also assume, *arguendo*, that clause 32 is a valid prohibition even though it does not come within the § 8(e) exemption.

[5] *Carpenters' Union* v. *Labor Board*, 357 U.S. 93 (1958); see also *N.L.R.B.* v. *Bangor Building Trades Council*, 278 F. 2d 287 (1st Cir. 1960).

> is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties. . . . This is so because by the employer's intelligent exercise of such a choice under the impact of a concrete situation when judgment is most responsible . . . Congress may rightly be assumed to have hoped that the scope of industrial conflict and the economic effects of the primary dispute might be effectively limited." *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 105-106 (1958).

We realize that this conclusion may leave the union with a valid contractual provision and with no means of enforcing it other than in a civil suit.[6] We also realize the difficulty the building crafts have with the secondary boycott provisions of the Labor-Management Relations Act,[7] but this court is not the forum in which to seek relief from what the union characterizes as "the shackles" of this statute.

The union also offers various subsidiary arguments. For example, it urges that the union's conduct should be sanctioned because Akron violated its contractual promise. Of this there is little doubt, but that is beside the point, for

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[6] Cf. Previant, Boycotts under the 1959 Amendments, XIII N.Y.U. Conf. on Labor, 141 at 169.

[7] Meyer, "Ally" or "Neutral"—The Secondary Boycott Dilemma, 34 Tulane L.R. 343, 349-52 (1960); Segal, Differences among Secondary Boycotts and the Taft-Hartley Act, 5 Wayne L.R. 195, 205-8 (1959); Previant, *supra* note 6; Aaron, The Labor-Management Reporting & Disclosure Act of 1959, 73 H.L.R. 1086, 1112-1121 (1960). Note, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L.R. 672, 689 (1951).

a secondary boycott is not justified, even when used as a retaliatory weapon.

Likewise beside the point is the argument that the Union used restraint in this dispute.[8] Even if this were true, such restraint does not indubitably indicate a permitted object. It may indicate, as it does here, merely a restrained manner of pursuing a proscribed end.

Thirdly, the union contends that its refusal to refer employees to Akron was not to "threaten, coerce, or restrain any person," within the meaning of the Act. We need not pass on the contention of the Board that any refusal to refer employees is to coerce or restrain. The facts in this case demonstrate, perhaps not as clearly as one might wish, but nevertheless adequately to sustain the Board's finding, that Akron was in fact dependent upon the union for employees and the union's refusal under such circumstances was to "coerce or restrain," within the meaning of the Act.

The union urges in addition that § 8(b)(4)(B) and § 8(b)(4)(D) are mutually exclusive, so that in the present case, where the union has been accused of violating both section, the Board cannot determine a union violation of § 8(b)(4)(B) before it determines the jurisdictional question under § 8(b)(4)(D). The Board answers that the two sections are not mutually exclusive, so that, even if the union prevails in the jurisdictional question, a secondary boycott is not permitted.

The Board has held that where a primary employer alone is involved, and the union has been charged with violation of § 8(b)(4)(D) as well as with some other violation of the statute, the § 8(b)(4)(D) determination will take precedence. This does not mean, however, that when a secondary employer is involved a § 8(b)(4)(D) determination

[8] Cf. *Electrical Workers* v. *Labor Board*, 366 U.S. 667 (1961).

must precede a determination of the secondary boycott. The secondary boycott provisions of the Act were designed to restrict the field of combat in industrial disputes. § 8(b)(4)(B) attempts to isolate labor disputes by declaring "off limits" to union pressure certain employers who are powerless to resolve a dispute between the union and another employer. To that end the Board has correctly concluded that, where the union brings pressure on one of these "neutral" parties, that activity is proscribed regardless of the jurisdictional question. The union would have to restrict its pressure in such a situation to the employer who can satisfy its demands.

The case cited to us by the union to show that the Board has changed its mind about §§ 8(b)(4)(D) and 10(k),[9] does not justify the position for which it is offered. In that case the union took direct action against the primary employer. There was no question of a secondary boycott. All that was there decided was that, in a primary dispute, the jurisdictional question should be resolved before the other primary questions.

Finally, the union contends that the present order is too broad. This order directed the union to cease and desist from:

> "(a) Engaging in, or inducing or encouraging employees of [Akron], or of any person engaged in commerce or industry affecting commerce, to engage in a strike or refusal in the course of their employment to use . . . any goods . . . or to perform any services where an object thereof is to force or require [Akron], or any other employer or person to cease doing business with [Venneri], or to force or require [Venneri] or any other person to cease doing business with [Nickles].

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[9] *Local 502 Hod Carriers* v. *N.L.R.B.*, 140 N.L.R.B. #69, 52 L.R.R.M. 1092, 63-1 CCH N.L.R.B. § 12032.

"(b) Threatening that it will not refer or otherwise furnish individuals for employment to [Akron], or any other person engaged in an industry affecting commerce, according to the provisions of an applicable contract, or refusing to refer such individuals for employment, in order to force or require [Akron], or any employer or other person to cease doing business with [Venneri], or to force or require [Venneri] or any other person to cease doing business with [Nickles]."

The union objects to the inclusion of the words "or any other person" in the order since there is no showing that any companies except Akron, Venneri and Nickles are involved in the present controversy. There is evidence, however, that the union's activities were directed not only to forcing Venneri to terminate Nickles' plumbing subcontract but also to forcing Venneri not to subcontract part of the plumbing work to any utility subcontractor. It is possible that the order might be construed to cover situations far removed from the present one, but in so far as this order attempts to prohibit the union from bringing similar pressure on a subcontractor to force Venneri to cease doing business with a utility subcontractor, it is valid. Cf. *Bakery Wagon Drivers* v. *N.L.R.B.*, —— U.S. App.D.C. ——, —— F.2d —— (1963), No. 17,200, decided May 23, 1963.

The union is quite correct, however, in urging that any reference to the Corps of Engineers in the "Notice to All Employees," whose publication is required by the Board, should be stricken. There is no evidence of any threat or coercion to force the Corps of Engineers not to do business with Venneri.

As modified, the order will be enforced.

So ordered.

Filed June 6, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,130

LOCAL NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition to Review and Set Aside, and on Cross-Petition for Enforcement of, an Order of the National Labor Relations Board.

Before: BASTIAN, BURGER and WRIGHT, *Circuit Judges.*

Judgment

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside, and a cross-petition for enforcement of, an order of the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case be modified as indicated in the opinion of this court and, as so modified, will be enforced.

Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Circuit Judge Bastian.

Dated: June 6, 1963

APPENDIX B

Pertinent provisions of the Labor-Management Relations Act of 1947, 61 Stat. 136, as amended, 29 U.S.C. 151, et seq., (1959) are as follows:

Sec. 7, 29 U.S.C. § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Sec. 8(b)(4)(i)(ii)(B)(D), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

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"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

• • • •

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturers, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such

labor organization has been certified as the representative of such employees under the provisions of section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

* * * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . ."

Sec. 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e):

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided, further, That for the purpose of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel

and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Sec. 10(k), 29 U.S.C. § 160(k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Sec. 13, 49 Stat. 457 (1935) as amended 29 U.S.C. 163 (1959):

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."